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In the Supreme Court
of the United States

OCTOBER TERM, 1971

No. 71-492

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, et al,
Respondents.

BRIEF IN OPPOSITION
TO
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the constitutional right of free expression includes the right to distribute non-commercial handbills in a peaceful and orderly manner within the malls and walkways of petitioner's shopping center which are functional equivalents of sidewalks of a public business district at times when they are open to general public access, particularly when petitioner permits non-commercial expression there by other outside groups whose ideas and purposes are approved by petitioner?

STATEMENT OF THE CASE

Respondents being dissatisfied with petitioner's Statement of the Case, this additional statement is submitted to facilitate understanding of the question presented.

This case involves a large urban shopping center known as Lloyd Center opened by petitioner in 1960 (Tr. p. 14). It is situated on all or parts of 39 city blocks, plus vacated former streets and sidewalk areas, near the center of the city of Portland (Ex. 3, 3A). The central portion of the shopping center complex is a single structure of several levels situated on what was formerly 18 city blocks (Ex. 3, 4, 5). This portion of the shopping center was referred to by the District Court as the "Mall" (Pet. App. 8a). The Mall, as well as other portions of petitioner's shopping center complex, was made possible by the city of Portland vacating public streets and sidewalks formerly traversing what is now the privately-owned shopping center property (Ex. 24, 27; Pet. App. 10a). The former public street and sidewalk area so vacated was 8.838 acres (Ex. 25, 26).

Within petitioner's shopping center are numerous broad malls and walkways leading from the central mall to covered and open parking areas and to exterior public sidewalks and streets. A skating rink and an auditorium used for public meetings are situated within the Mall. The malls and walkways within the shopping center are open to the general public at all times (Pet. App. 10a).

Petitioner maintained and enforced a policy forbidding distribution of any handbills or other literature of any sort on the malls, walkways and other areas open to the general public within the shopping center (Pet. App. 9a). This policy is enforced by petitioner's staff of uniformed security guards, who hold commissions from the city of Portland appointing them Special Police Officers "vested with full police authority" (R. 17; Ex. 7). Petitioner, however, has permitted a variety of non-commercial activities on the malls and walkways open to the general public within the shopping center (Pet. App. 8a). The Salvation Army and Volunteers of America are permitted to solicit funds through bell-ringers in the Christmas Season. A veterans organization is allowed to sell "Buddy Poppies." Displays have been set up in the malls by outside organizations such as the Boy Scouts and antique automobile groups. Election rallies for presidential candidates, football rallies, Veterans Day ceremonies by veterans' organizations, and performances by outside musical groups have all been permitted in these areas by petitioner.

Petitioner, however, has not permitted all outside organizations to engage in similar non-commercial activities on malls within the shopping center. It has refused permission, for example, for solicitations by the March of Dimes and Hadassah, a national Zionist women's service organization. Permission for non-commercial activities on the malls within the shopping center is granted by petitioner to outside groups

on the basis of whether it approves of a particular organization and its purposes (Pet. App. 8a-9a).

On November 14, 1968, a number of persons, including respondents, distributed leaflets to passersby at various points within the walkways of the Mall. The distributors were associated with an informal group known as "The Resistance" or "The Resistance Community," whose common interest is opposition to the war in Vietnam.

The leaflets contained both an invitation and a political message. They invited the public to a potluck dinner and meeting to be held that evening at a church, characterizing it as a "Celebration of life," and a "communial feast and liturgy of liberation." The political statements on the leaflets included (Ex. 1):

> "The brothers and sisters of the community will be affirming their commitment to Life by severing their connection with the Selective Service System and the international murder that it supports.
>
> . . . . .
>
> "The Resistance is people enough concerned about the guns and bombs of war (Vietnam, Guatemala, Laos) to deal with the problem actively. The Resistance is the young man who refuses to cooperate with the Selective Service, a tool of killing in a fashion only a little more politely than a gunman gone wild in the streets. The Resistance is people who refuse their taxes (82% for war in '68). The Resistance is you and me, aiding and abetting these people, all people to live in brotherhood and peace."

Respondents and others distributing the leaflets on the walkways of the shopping center, were ordered by petitioner's security guards to cease distribution within the shopping center. The security guards threatened respondents with arrest if they did not comply with these orders (Pet. App. 9a). To avoid arrest, respondents and other persons distributing the leaflets within the shopping center moved to the exterior public sidewalks outside the shopping center to complete their distribution.

The distribution of the leaflets within the shopping center was at all times peaceful and orderly, and did not interfere with normal use of the malls and walkways by the public (Pet. App. 9a).

The District Court found that the interior parking facilities and walkways of the shopping center serve the same purpose as streets and sidewalks of a public business district, and that the Mall is the functional equivalent of a public business district (Pet. App. 10 a). It held that respondents had a constitutional right to distribute the handbills in question in an orderly and peaceful manner to passersby in the walkways of the shopping center. The Court further held that threats of arrest in the exercise of their police authority by petitioner's uniformed security guards caused the distributors to discontinue their handbilling, and constituted action "under color of law," in violation of 42 U.S.C. § 1983. The decision and Declaratory Judgment and Decree of the District Court were affirmed by the Court of Appeals.

ARGUMENT

Reasons for Denying the Writ

I

The constitutional question has been decided against Petitioner's position by every Appellate Court considering it.

Petitioner contends incorrectly that this case involves a question left open in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968): whether picketing on privately owned shopping center property is within First Amendment guaranties if it is not "directly related in its purpose" to the use of the property by the owner and its tenants.

This case does not involve picketing and its greater potential for economic disruption and interference with normal business activities. It involves only pure expression of a political viewpoint in the form of handbilling. Every appellate court considering the point has rejected petitioner's argument here that the constitutional right of free political expression does not exist on walkways open to the general public within privately owned shopping centers, unless directed to the owner or an occupant of the shopping center. *Diamond* v. *Bland*, 3 Cal. 3d 653, 477 P.2d 733 (1970), cert. den. 402 U.S. 988 (1971), reh. den. — U.S. — (10/12/71); *Sutherland* v. *South Center Shopping Center*, 3 Wash. App. 833, 478 P.2d 792 (1971); *State* v. *Miller*, 280 Minn. 566, 159 N.W.2d

895 (1968); *Tanner* v. *Lloyd Corp.*, — F.2d — (C.A. 9, 1971). The only holdings to the contrary are by three trial courts, whose decisions are all pending for review in appellate courts (see Petition for Cert., p. 9).

The uniform decisions by appellate courts on the issue raised by petitioner here refute petitioner's claim that *Logan Valley* presently causes any confusion or uncertainty on the correct disposition of the issue.

II

The constitutional question was correctly decided below.

Petitioner does not challenge the findings below that its shopping center is "the functional equivalent of a public business district" and that the interior parking areas and walkways of the shopping center are functional equivalents of streets and sidewalks of a public business district (Pet. App. 10a). Indeed, it could hardly do so when the shopping center complex was created by vacation of public streets and sidewalks which formerly traversed the site of the shopping center. Instead, petitioner argues that constitutional guaranties of free expression do not extend to areas of the shopping center which are functional equivalents of public sidewalks unless the expression is related directly to some use being made by the owner or occupants of the shopping center property and the expression is "necessary" for effective communication.

If respondents had leafleted on a city sidewalk in the same peaceful and orderly fashion as shown by the evidence in this case, it could not be prohibited. *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Lovell* v. *Griffin*, 308 U.S. 444 (1938). No relationship of the expression to normal uses of the sidewalk or adjacent property is required as a condition to free exercise of expression there, nor is it material that the expression might be communicated effectively elsewhere. *Schneider* v. *State*, 308 U.S. 147 (1939); *Jones* v. *Board of Regents*, 436 F.2d 618, 622 (C.A. 9, 1970).

Marsh v. *Alabama*, 326 U.S. 501 (1946), held that the constitutional rights of free expression may be exercised on privately owned sidewalks of a company town which were the functional equivalent of a public business district. *Marsh* was applied to privately owned shopping centers in *Logan Valley:*

> "We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership.
>
> . . . . . .
>
> "And it may well be that respondents' ownership of the property here in question gives them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permis-

sible were the property owned by a municipality. All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' *Marsh* v. *Alabama*, 326 US at 508, 90 L Ed at 269, the State may not delegate the power through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." (391 U.S. at 319-320).

The rationale of both *Marsh* and *Logan Valley*, as well as of the courts below in this case, is that to permit private owners of the functional equivalents of public sidewalks in the functional equivalent of a public business district to prohibit or limit communications to the public frustrates the public's need for uncensored information. This Court in *Logan Valley* recognized that such limitations in the context of large modern shopping centers would stifle free expression in some business districts of the city, and thus confine free speech and press to publically-owned business districts. 391 U.S. at 324-325. Without the "functional equivalent" doctrine of *Marsh* and *Logan Valley*, freedom of communication would be restricted in direct proportion to the continued growth of private shopping centers noted by the court in *Logan Valley*, 391 U.S. at 324.

Petitioner's contention that the Court of Appeals was "patently incorrect" in stating that its holding

here was not an extension of *Logan Valley* or *Marsh*, misapprehends the opinion. The Court of Appeals, quoting the District Court, noted that petitioner had opened its shopping center to widespread use by outside groups whose expression was not directed toward petitioner or its tenants occupying the property (Pet. App. 3a, 8a-9a):

> "The Mall is open to the general public. In addition, the Corporation invites groups to conduct activities there, if those activities will promote 'customer motivation.' It has invited schools to hold football rallies, service organizations to hold Veterans Day ceremonies, and presidential candidates to give speeches during election years.
>
> "The Corporation also permits groups which it believes to be worthy to use the Mall even though they do not add to 'customer motivation.' It permits the American Legion to sell 'buddy' poppies at least once each year, and every year before Christmas, it permits bellringers for the Salvation Army and Volunteers of America to set up kettles and solicit contributions.
>
> "The Corporation prohibits other groups from using the Center for their own purposes. It denied the March of Dimes and Hadassah, a national Zionist women's service organization, the opportunity to solicit contributions and denied Governor Tom McCall the opportunity to make a political speech. As part of this policy, the Corporation prohibits the distribution of handbills within the Mall."

Thus, respondents' peaceful and orderly handbilling here was exercise of "their First Amendment rights

on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put" (*Logan Valley*, 391 U.S. at 319-320).

Petitioner argues that respondents' distribution of leaflets within the shopping center was not "necessary" to effective expression of their views. As pointed out above, this is immaterial. In any event, the finding of the District Court is contrary to petitioner's contention:

> "The Corporation contends that Plaintiffs can distribute handbills just as effectively from the public streets and sidewalks as from the interior of the Mall. It would be difficult and perhaps dangerous for Plaintiffs to distribute their handbills from the public sidewalks to customers entering the Mall. Many customers do not use the public sidewalks and streets except when entering the Mall by automobile. In addition, it would be much more difficult to reach pedestrians on the public sidewalks than to reach them in parts of the Mall interior through which most customers pass. I find that plaintiffs cannot distribute handbills as effectively from the public streets and sidewalks as they can from the Mall interior." (Pet. App. 11a).

Note that the leafletters in *Austin*, *supra*, 402 U.S. 415, went to a shopping center to accomplish effective dissemination of their views to the public.

Petitioner argues that it has an absolute right to prohibit expression anywhere on its shopping center property, to whatever extent it may see fit (Petition, 13-14). This absolute position has been consistently

rejected by the courts since *Marsh:*

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506.

Expression on private property which is the functional equivalent of a public business district is no doubt subject to limited regulation, as it is on public property, to prevent unreasonable interference with or disruption of the normal uses of the property. E.g., *Adderly* v. *Florida*, 385 U.S. 39 (1966). This case, however, does not involve any question of reasonable regulation or limitation of expression, but an attempt by petitioner to enforce a complete and absolute prohibition on any and all handbilling anywhere within its shopping center property. The courts below, following *Marsh* and *Logan Valley*, correctly rejected petitioner's position.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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